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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

UMG RECORDINGS, INC., CAPITOL  
RECORDS, LLC, CONCORD BICYCLE  
ASSETS, LLC, CMGI RECORDED MUSIC  
ASSETS LLC, SONY MUSIC  
ENTERTAINMENT, and ARISTA MUSIC,

*Plaintiffs,*

v.

INTERNET ARCHIVE, BREWSTER  
KAHLE, KAHLE/AUSTIN FOUNDATION,  
GEORGE BLOOD, and GEORGE BLOOD  
L.P.,

*Defendants.*

Case No. 3:23-cv-06522-MMC

**DEFENDANTS INTERNET ARCHIVE,  
KAHLE, KAHLE/AUSTIN FOUNDATION,  
BLOOD, AND GEORGE BLOOD L.P.'S  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR LEAVE TO FILE SECOND AMENDED  
COMPLAINT**

Date: April 11, 2025

Time: 9:00 a.m.

Place: Courtroom 7, 19th Floor

Judge: Hon. Maxine M. Chesney

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1 **I. INTRODUCTION**

2 Throughout this litigation—and for years before this case was filed—Plaintiffs have been  
 3 engaged in a long-running game of hide-the-ball. The Great 78 Project began more than seven  
 4 years ago, as a community project to locate, preserve, and study 78 rpm records—the finite and  
 5 fast-disappearing resource of now-obsolete shellac discs on which music was released for the first  
 6 half of the twentieth century. Defendants’ efforts to archive these works as they would have been  
 7 heard and experienced at the time they were created preserves a key part of American cultural  
 8 history. Garnering public support, and donations of old, deteriorating 78 rpm records, the Great  
 9 78 Project has never been a secret; soon after its launch, the Great 78 Project received broad press  
 10 coverage within and outside of the music industry. *See* Defs’ Mot. to Dismiss (ECF No. 75) at 4-  
 11 6.

12 Plaintiffs have known about the Project since *at least* June 2020—almost five years ago—  
 13 when the Recording Industry Association of America (“RIAA”), the powerful trade association  
 14 representing the major record labels, sent a letter on behalf of its members accusing the (non-  
 15 profit) Internet Archive of infringing their sound recordings through the Great 78 Project. But  
 16 when Internet Archive offered to work with the RIAA to take down any specific sound recordings  
 17 that RIAA members identified, the RIAA never responded (nor did any of the record label  
 18 Plaintiffs). Instead, they sat back and waited more than three years to file this lawsuit, asserting  
 19 many claims for infringement that had already expired under the statute of limitations.

20 Since filing suit, Plaintiffs have only continued their gamesmanship. For almost *ten months*  
 21 now, Defendants have repeatedly asked Plaintiffs to produce basic information about the more  
 22 than 4,000 works at issue in this litigation—a number of works already expanded from the original  
 23 Complaint through an Amended Complaint filed in March 2024. But they have stonewalled  
 24 Defendants’ efforts to obtain fundamental discovery about, for example, Plaintiffs’ purported  
 25 ownership of these works, digital copies of the works in suit for comparative analysis with the  
 26 sound recordings on the Great 78 Project, information about the remastering process that Plaintiffs  
 27 have used for the works in suit, corporate structure information (including organizational charts or  
 28 the identities of individuals responsible for archiving or remastering work), and more. These are

gating items from which other discovery flows, and are essential to understanding Plaintiffs’ allegations about the works in suit—especially because Plaintiffs never identified the allegedly infringing works before filing their Complaint or Amended Complaint.

Now, a full seventeen months into this litigation, and with the final stretch of fact discovery approaching, Plaintiffs seek to add yet more works to this suit—and not just a few. But once again, Plaintiffs did not bother to identify the purportedly infringing sound recordings to Defendants before seeking to add them to this lawsuit. Nor did Plaintiffs meaningfully engage in any effort to meet-and-confer regarding these new recordings, waiting until two days before their deadline to provide notice, and failing even to share with Defendants the proposed amended complaint before seeking leave to amend. What’s more, Plaintiffs have acknowledged that they were aware of many of the works they now seek to add to this suit *shortly after the filing of the original complaint* and *before* they sought to amend the complaint a year ago, in March 2024. Declaration of Allison L. Stillman ¶ 4. (“Stillman Decl.”). And they provide no justification for their unreasonable delay—much less for their repeated refusal to simply engage with Defendants about the works they wish to have removed from the Great 78 Project. Indeed, Plaintiffs have even acknowledged that some of the recordings they now seek to add as works in suit were *voluntarily* and *proactively removed* from the Great 78 Project no later than October 2023, even without Plaintiffs identifying these works. *Id.* In other words, Plaintiffs seek to sue Defendants for alleged infringement for many works that (1) Plaintiffs have been aware of for more than a year, (2) have not been available on the Great 78 Project for just as long, and (3) Plaintiffs could not be bothered to simply identify to Defendants at any point in the last five years since Plaintiffs learned of the Great 78 Project.

All of this makes plain why Plaintiffs’ late-in-the-day motion for leave to amend to assert hundreds of additional works should be denied. Plaintiffs have been woefully deficient in producing the discovery they must for the thousands of works that are already at issue in this litigation. Adding even more works with only months left before the fact discovery deadline would be severely prejudicial to Defendants. That prejudice alone is sufficient reason to deny Plaintiffs’ motion, and courts in similar cases routinely reject attempts to insert this scale of additional claims into a copyright case. But the other factors governing leave to amend support denying Plaintiffs’

1 motion too. Plaintiffs' delay in seeking to assert these works is unreasonable: Plaintiffs admit  
 2 they have been aware of many of these works for more than a year, and they could have asserted  
 3 these works more than a year ago during a previous opportunity they were given to amend. It is  
 4 clear that this lawsuit is just a strategic ploy to try to rack up potential statutory damages claims to  
 5 pressure Defendants, without actually expending the significant effort required to develop the  
 6 factual record to prove their claims and overcome Defendants' legitimate defenses.

7 That gambit should not be rewarded. For all of these reasons, Plaintiffs' motion should be  
 8 denied.

## 9 **II. BACKGROUND**

10 Plaintiffs have known about the Great 78 Project for years. *See* Defs' Mot. to Dismiss  
 11 (ECF No. 75) at 2, 6; Am. Compl. (ECF No. 95) ¶ 80. The Project began more than seven years  
 12 ago. Mot. to Dismiss at 4. The RIAA (which represents the recording industry, including  
 13 Plaintiffs) contacted Internet Archive in June 2020 about alleged infringement of RIAA members'  
 14 sound recordings. *Id.* at 6. Internet Archive sought to work with the RIAA to remove any  
 15 recordings the RIAA identified from the site. But Plaintiffs never responded. *Id.* at 6-7. Instead,  
 16 Plaintiffs filed this lawsuit more than three years later, on August 11, 2023, identifying 2,749 sound  
 17 recordings as works in suit that they assert Defendants have allegedly infringed through the Great  
 18 78 Project. Compl. (ECF No. 1); Compl. Ex. A (ECF No. 1-1).

19 Since filing suit, Plaintiffs have already had an opportunity to amend their Complaint to  
 20 assert additional works. In March 2024, soon after this case was transferred from the Southern  
 21 District of New York and before discovery began in earnest, Plaintiffs moved to amend (and  
 22 Defendants did not oppose) the addition of approximately 1,400 works in suit, bringing the total  
 23 number of works to 4,142. Am. Compl. (ECF Nos. 95); Am. Compl. Ex. A (ECF No. 95-1). On  
 24 November 22, 2024, the Court entered a Pretrial Preparation Order. *See* Pretrial Preparation Order  
 25 (ECF No. 144). In the Order, the Court set a deadline of March 6, 2025, for any motion for leave  
 26 to amend the Complaint; a July 25, 2025, deadline for the close of fact discovery; a November 25,  
 27 2025, deadline for the close of expert discovery; and a February 6, 2026, date for summary  
 28 judgment motions. *Id.*

On March 4, 2025—two days before the deadline to move for leave to amend pleadings—Plaintiffs emailed Defendants requesting consent to Plaintiffs’ plan to file a Second Amended Complaint to, among other things, “add works to Exhibit A that have been infringed since the *original complaint* was filed.” Stillman Decl. ¶ 1; Ex. 1.<sup>1</sup> Plaintiffs did not provide a copy of their proposed amendments, nor did they explain how many works they intended to add. Stillman Decl. ¶ 2.<sup>2</sup> At a subsequent meet-and-confer regarding Plaintiffs’ proposed amendments, counsel for Defendants raised the fact that Plaintiffs never provided a copy of their proposed amendments for Defendants to review, and asked for clarification of how many works Plaintiffs intended to seek to add to the Complaint, as well as how and when Plaintiffs discovered these sound recordings. Stillman Decl. ¶ 4. When Plaintiffs’ counsel explained that they sought to add hundreds of additional works in suit, and that Plaintiffs were aware of many of these recordings *as early as September or October 2023* but did not seek to add them as part of the amendments in March 2024, Defendants informed Plaintiffs that Defendants would not consent to amendment, citing the prejudice to Defendants from such a proposal. *Id.*

Plaintiffs subsequently filed their motion for leave to file a Second Amended Complaint. Pls.’ Mot. for Leave to File Second Am. Compl. (ECF No. 159, “Mot.”). Plaintiffs seek to add 493 more sound recordings to Exhibit A, which would bring the total number of works in suit to 4,624. Proposed Am. Compl. Ex. A (ECF No. 159-1).<sup>3</sup>

### III. LEGAL STANDARD

Any amendment at this stage requires the court’s leave. Fed. R. Civ. P. 15(a)(2). When, as here, a court has already granted a plaintiff an opportunity to amend its complaint, the court’s discretion to deny successive motions to amend is “particularly broad.” *Kifle v. YouTube LLC*, 2022 WL 1501014, at \*3 (N.D. Cal. May 12, 2022) (citation omitted); *see also Bronstein v. U.S.*

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<sup>1</sup> “Ex.” refers to Exhibits to the Declaration of Allison L. Stillman filed contemporaneously with this Opposition.

<sup>2</sup> Even had Plaintiffs provided a copy of the proposed amendment at the time of the notice, one business day’s notice would not have provided a meaningful opportunity to consider the proposed amendment for purposes of the meet and confer procedural requirement.

<sup>3</sup> It appears that Plaintiffs’ proposed amendments would also delete a handful of works previously identified in Exhibit A (without specifying precisely which). *See* Mot. 2-3.



1 *Customs*, 2016 WL 4426900, at \*3 (N.D. Cal. Aug. 22, 2016) (“[A] district court’s discretion to  
2 deny leave to amend is broader where the plaintiff has previously filed an amended complaint.”).

3 Courts consider five factors when determining whether to grant leave to amend: “(1) bad  
4 faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and  
5 (5) repeated failure to cure deficiencies despite previous amendments.” *Shelton v. Comerica Bank*,  
6 2024 WL 234721, at \*1 (N.D. Cal. Jan. 22, 2024); *see also Foman v. Davis*, 371 U.S. 178, 182  
7 (1962). Courts widely recognize that “it is the consideration of prejudice to the opposing party  
8 that carries the greatest weight” in this analysis. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
9 1048, 1052 (9th Cir. 2003); *see also Cellink Corp. v. Manaflex LLC*, 2024 WL 4844382, at \*2  
10 (N.D. Cal. Nov. 19, 2024) (“The Court weighs prejudice to the opposing party most heavily.”).

#### 11 **IV. ARGUMENT**

12 Plaintiffs’ motion should be denied. The default case management deadline for amending  
13 pleadings does not grant them leave as a matter of course. Instead, they must satisfy Rule 15’s  
14 requirements—requirements Plaintiffs flunk here. Indeed, the most important factor—prejudice—  
15 strongly favors Defendants. And the other relevant factors similarly underscore why Plaintiffs’  
16 motion should be denied.

##### 17 **A. THE CASE MANAGEMENT SCHEDULE’S DEFAULT DEADLINE FOR** 18 **AMENDMENT DOES NOT “PRESUMPTIVELY” GRANT PLAINTIFFS** 19 **LEAVE TO AMEND**

20 As an initial matter, Plaintiffs argue that it is not necessary for them to establish they should  
21 be granted leave to amend, because “[t]he Court’s [Pretrial Preparation Order] presumptively  
22 establishes that amendments before the deadline established therein are made with leave of Court  
23 and thus comport with Rules 15(a)(2) and 16(b).” Mot. 5. Plaintiffs are wrong.

24 Indeed, this Court has previously rejected precisely this interpretation of an amendment  
25 deadline in a Pretrial Preparation Order. In *Thornton v. FCA US LLC*, the plaintiff “relie[d] on the  
26 Court’s having set, in its Pretrial Preparation Order, a deadline of April 30, 2022, to amend  
27 pleadings” as excusing the plaintiff from the need to comply with Rule 15(a)(2). 2022 WL  
28 2290623, at \*1 (N.D. Cal. June 24, 2022) (Chesney, J.). As this Court explained, however, “the

1 deadline set by the Court was the deadline for a party to *either move to amend or to file a stipulation*  
 2 *agreeing to such amendment.*” *Id.* (emphasis added). So too here.

3 As a result, Plaintiffs’ amendment is not “presumptively” proper, and instead they must  
 4 satisfy Rule 15’s requirements to demonstrate that leave should be granted.

5 **B. PLAINTIFFS’ REQUEST FOR LEAVE TO AMEND SHOULD BE DENIED**

6 Plaintiffs’ request for leave to amend should be denied. Plaintiffs’ proposed amendment  
 7 would severely prejudice Defendants, given the dismal state of Plaintiffs’ current document  
 8 productions on the more than 4,000 works already at issue in this case and the looming fact  
 9 discovery deadline. That alone justifies denial of Plaintiffs’ motion. But the other amendment  
 10 factors favor Defendants too. For all these reasons, the Court should deny the motion.

11 **1. Plaintiffs’ Proposed Amendment Would Severely Prejudice Defendants**

12 The Ninth Circuit has emphasized that prejudice to the opposing party is the “touchstone  
 13 of the inquiry under rule 15(a)” when assessing whether to grant leave to amend. *Eminence*  
 14 *Capital*, 316 F.3d at 1052 (citation omitted). Here, that factor strongly supports denying Plaintiffs’  
 15 motion for leave to amend.

16 This case currently involves Plaintiffs’ allegations of infringement of more than 4,000  
 17 individual sound recordings. Am. Compl. Ex. A (ECF No. 95-1). A copyright infringement claim  
 18 is work-specific, meaning that a plaintiff bears the burden of establishing infringement as to *every*  
 19 *work* on which she chooses to sue. *See, e.g., Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.  
 20 340, 361 (1991) (“To establish infringement, two elements must be proven: (1) ownership of a  
 21 valid copyright, and (2) copying of constituent elements *of the work* that are original.” (emphasis  
 22 added)). In other words, each of those thousands of works amounts to a case in itself, for which  
 23 Plaintiffs must prove the elements of infringement and overcome Defendants’ defenses.  
 24 Moreover, because this case involves sound recordings fixed before 1972, Plaintiffs must *actually*  
 25 *prove* their ownership of each of these works—they cannot rely, as plaintiffs in copyright cases  
 26 usually can, on the rebuttable presumption of ownership created by a copyright registration. *Cf.*  
 27 17 U.S.C. § 410(c). That is because when Congress extended infringement protection for pre-  
 28 1972 sound recordings in the Classics Act, it did not extend a presumption of validity to the

1 “schedules” that the owners of such recordings file with the Copyright Office. *See generally id.*  
 2 § 1401 (cross-referencing various provisions of the Copyright Act, but not § 410(c)).<sup>4</sup> As a result,  
 3 it is Plaintiffs’ burden to prove, on a work-by-work basis, that they own *each* of the thousands of  
 4 works in suit, in addition to proving each of the other elements of infringement.

5 That is not a straightforward task. When the Classics Act extended protection to pre-1972  
 6 sound recordings, it defined ownership of rights in these recordings by reference to state law. *See*  
 7 17 U.S.C. § 1401(l)(2)(A) (defining “rights owner” as “the person that has the exclusive right to  
 8 reproduce a sound recording *under the laws of any State*, as of [October 10, 2018]” (emphasis  
 9 added)). But the scope of those state-law rights (such as whether or in whom initial copyright  
 10 ownership vests, or what is required to effectively assign or transfer such rights once created) is  
 11 untested, unsettled, or unknown. *See* Recording Industry of America (RIAA) & American  
 12 Association of Independent Music (A2IM), *Comment Letter in the Matter of Federal Copyright*  
 13 *Protection of Sound Recordings Fixed Before February 15, 1972*, at 5 (Jan. 31, 2011), [https://](https://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf)  
 14 [www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf](https://www.copyright.gov/docs/sound/comments/initial/20110131-RIAA-and-A2IM.pdf) (referring to  
 15 the “legal chaos” involved in resolving “basic questions pertaining to the ownership, rights,  
 16 exceptions and remedies applicable to each and every pre-1972 U.S. recording with the hardships  
 17 of chain of title, administrative and legal review, litigation, etc.”). And because it is *Plaintiffs’*  
 18 burden to establish ownership, it is also their burden to establish that they hold the exclusive right  
 19 to reproduce each of the works at issue under the relevant state law.

20 To date, however, Plaintiffs’ production of documents to support their claims for the works  
 21 that are *already* at issue in this litigation has been woefully deficient. For example, despite the  
 22 approaching July 25 fact discovery deadline, Plaintiffs have yet to produce documentation  
 23 supporting the complete chain of title for the vast majority of works in suit. Indeed, they have  
 24 produced contracts and licenses for only a small handful of the artists and works in suit, and  
 25 similarly sparse materials tracing the merger, sale and other corporate history for Plaintiffs

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26 <sup>4</sup> The Copyright Office maintains a public index of these schedules. *See Schedules of Pre-1972*  
 27 *Sound Recordings*, U.S. Copyright Off., [https://www.copyright.gov/music-](https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html)  
 28 [modernization/pre1972-soundrecordings/search-soundrecordings.html](https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html) (last visited Mar. 13,  
 2025). But it does not “examin[e]” these schedules for validity as it does conventional copyright  
 registrations. 17 U.S.C. § 410(a)-(b).

1 themselves. Stillman Decl. ¶ 5. Tracing the chain of title for individual works—all of which were  
2 created more than 50 years ago, and many of which were created several decades even before  
3 that—is an extremely labor intensive task. Exhibits 2 and 3 are representative of many of the  
4 agreements that Plaintiffs have produced to date. As even a brief review of those Exhibits reveals,  
5 there is no quick or simple way to determine how or whether these agreements support Plaintiffs’  
6 ownership. Among other things, there is no way from the face of these agreements to determine  
7 *which* sound recordings were made pursuant to the agreements or on what dates. *See* Ex. 2; Ex. 3.  
8 Without that information, connecting the dots from the agreements to any of the works in  
9 Plaintiffs’ current Exhibit A is a gargantuan undertaking—to say nothing of connecting each initial  
10 agreements executed in the 1940s and 1950s with any subsequent agreements or licenses necessary  
11 to establish Plaintiffs’ ownership *today*. Plaintiffs seek to exacerbate these existing burdens by  
12 adding several hundred additional works, when the near-entirety of discovery for the works that  
13 have been in the case since the outset remains outstanding. Defendants have been asking for this  
14 essential discovery since July 2024. Stillman Decl. ¶ 5. The severe prejudice to Defendants is  
15 obvious.

16 As another example, Plaintiffs agreed months ago, in December 2024, to produce digital  
17 copies of the various sound recordings at issue that they claim are commercially available today.  
18 Stillman Decl. ¶ 5. Plaintiffs have only just produced those digital copies after seeking leave to  
19 amend to add more works and on the eve of Defendants’ opposition deadline. Indeed, Plaintiffs  
20 waited until approximately 1:30 AM Eastern on Wednesday March 19 to produce copies of more  
21 than 5,000 sound recordings. Stillman Decl. ¶ 6. Yet that production remains woefully deficient.  
22 More than 2,000 of those sound recordings do not even list the title of the work (making it  
23 impossible to pair the produced digital copy with a Great 78 Project version). *Id.* And Plaintiffs  
24 have provided no explanation for the more than 1,000-work discrepancy between the number of  
25 digital copies produced (approx. 5,000) and the number of works in suit (approx. 4,000). Stillman  
26 Decl. ¶ 7. For this category of discovery, too, Plaintiffs seek to increase the burden on Defendants  
27 before they have even begun to discharge their existing and very significant discovery  
28 responsibilities.

1 And these are for two categories of foundational documents that Plaintiffs have *agreed* to  
 2 produce. The prejudice from adding additional works is only magnified when one considers  
 3 Defendants’ requests for which Plaintiffs have, to date, continued to refuse to respond, or to limit  
 4 the scope of their response, despite their obvious relevance to this litigation and needs of the case.  
 5 *See* Ex. 4. These include, for example, documents and communications related to Plaintiffs’  
 6 remastering, sound editing, and/or restoration work that they have performed on the sound  
 7 recordings at issue; documents and communications concerning Plaintiffs’ discovery of the alleged  
 8 infringement at issue; documents and communications between Plaintiffs and the RIAA or its  
 9 members concerning the Great 78 Project or Defendants; and more. *See generally id.* Plaintiffs’  
 10 reticence to provide this plainly relevant discovery has served only to reduce the time available to  
 11 review the discovery that is ultimately produced. Adding additional works on top of that burden  
 12 will make it harder not only to complete review, but also even to determine whether there are  
 13 deficiencies in what Plaintiffs ultimately produce.

14 Plaintiffs respond that Defendants will not be prejudiced because “substantial undue  
 15 prejudice exists only where the claims sought to be added ‘would have greatly altered the nature  
 16 of the litigation and would have required defendants to have undertaken, at a late hour, an entirely  
 17 new course of defense,’” and “[n]o such circumstances exist here.” Mot. 5-6 (alteration omitted)  
 18 (quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). But  
 19 contrary to Plaintiffs’ argument, the addition of several hundred new works in suit *does* “greatly  
 20 alter[] the nature of the litigation,” because each of those works is a new copyright infringement  
 21 case with respect to *that* work in itself: Plaintiffs will have to prove ownership, including via  
 22 complete chain of title documents and possibly associated testimony and analysis of relevant state  
 23 law, and the parties will have to develop the record with respect to use of the work, all available  
 24 defenses, and all relevant issues regarding possible damages in the event any infringement is  
 25 found.

26 That is why courts in copyright cases routinely reject as prejudicial proposed amendments  
 27 like Plaintiffs’ that substantially expand the scope of the case. *See, e.g., Hau Dzong v. Tran*, 2019  
 28 WL 7166054, at \*5-6 (C.D. Cal. Sep. 24, 2019) (denying leave to amend when plaintiff sought to

add 809 works in suit because “the list was “so numerous that Defendants would be prejudiced by having to prepare an entirely different case”); *Minden Pictures, Inc. v. Pearson Educ., Inc.*, 2013 WL 71774, at \*2-3 (N.D. Cal. Jan. 7, 2013) (denying leave to amend when plaintiff’s proposed amendment “creates the potential for a massive expansion of the scope of discovery,” and finding prejudice “very likely” since the opposing party would “face[] a choice between heavy discovery burdens within a narrow window or additional delay to complete discovery”); *see also Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387-88 (9th Cir. 1990) (finding undue prejudice when proposed amendment “require[s] proof of different facts”).

Plaintiffs fall back on the argument that there is no prejudice because “Defendants have been on notice of Plaintiffs’ intent to amend the Complaint.” Mot. 6. But Defendants’ knowledge, in the abstract, that Plaintiffs intended to amend the Complaint in some totally unspecified way does not reduce any of the prejudicial effects of their proposed amendment discussed above. Otherwise, an opposing party could *never* claim prejudice in any case that included a case management order with a deadline for amended pleadings. That cannot be the law.

For all of these reasons, Plaintiffs’ proposed amendments would severely prejudice Defendants. This conclusion alone warrants denial of Plaintiffs’ motion. *See, e.g., Isilon Sys., Inc. v. Twin City Fire Ins. Co.*, 2012 WL 503854, at \*2 (W.D. Wash. Feb. 15, 2012) (undue prejudice alone sufficient to deny leave).

## **2. The Other Factors Similarly Favor Defendants**

Although prejudice “alone[] is sufficient to deny [Plaintiffs’] motion to amend,” the other factors also support denying Plaintiffs’ motion. *Burt v. Denoyo*, 2015 WL 1799864, at \*2 (D. Or. Apr. 14, 2015). In particular, Plaintiffs’ long delay in seeking to amend to assert these additional works—despite apparently knowing of many of these works’ inclusion in the Great 78 Project since approximately the time of the initial complaint almost two years ago—disfavors leave to amend here. The fact that this would be Plaintiffs’ second chance to amend similarly counsels against granting leave. And Plaintiffs’ proposed amendments reflect nothing more than their attempt to maximize their potential statutory damages, to create greater leverage over Defendants.



1 First, Plaintiffs have unduly delayed in seeking to amend their pleadings to include these  
 2 additional sound recordings. “The undue delay inquiry focuses on whether the plaintiff knew of  
 3 the facts or legal bases for the amendments at the time the operative pleading was filed and  
 4 nevertheless failed to act promptly to add them to the pleadings.” *McFall v. Stacy & Witbeck, Inc.*,  
 5 2016 WL 2851589, at \*3 (N.D. Cal. May 16, 2016); *see also CelLink Corp. v. Manaflex LLC*,  
 6 2024 WL 4844382, at \*4 (N.D. Cal. Nov. 19, 2024). Here, Plaintiffs’ motion makes clear that  
 7 they were aware of many of the sound recordings they propose to add as works in suit since before  
 8 the time of their *last opportunity* to amend the Complaint a year ago. *See* Mot. 6 (stating that “all  
 9 of the works” in Second Amended Exhibit A are works Defendants allegedly “infringed since the  
 10 filing of the *original complaint*”—not the amended complaint). Indeed, during the parties’ meet-  
 11 and-confer regarding Plaintiffs’ proposed amendment, Plaintiffs’ counsel implied that Plaintiffs  
 12 were apparently aware of many of these sound recordings no later than September or October  
 13 2023. Stillman Decl. ¶ 4.<sup>5</sup> That amounts to a delay of 18 or more months, and includes an  
 14 intervening opportunity for Plaintiffs to amend their complaint to add these works. Courts have  
 15 found significantly shorter time periods to amount to undue delay. *See, e.g., AmerisourceBergen*  
 16 *Corp. v. Dialysis West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (“[A]n eight month delay between  
 17 the time of obtaining a relevant fact and seeking a leave to amend is unreasonable.”).

18 Second, and relatedly, Plaintiffs have already had an opportunity to amend their complaint,  
 19 which similarly disfavors their successive motion. *See, e.g., Kifle*, 2022 WL 1501014, at \*3  
 20 (observing that when “court has already granted a plaintiff leave to amend their complaint, the  
 21 court’s ‘discretion in deciding subsequent motions to amend is particularly broad’” and denying  
 22 leave to amend (citation omitted)); *Lenk v. Monolithic Power Sys., Inc.*, 2016 WL 1258862, at \*3  
 23 (N.D. Cal. Mar. 31, 2016) (same). In combination with the severe prejudice to Defendants and  
 24 Plaintiffs’ long delay in seeking amendment to assert these works, the failure to take advantage of  
 25 previous opportunities to amend supports denial of Plaintiffs’ motion.

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26 <sup>5</sup> In fact, as Plaintiffs’ counsel alluded to during the parties’ meet-and-confer, many of these sound  
 27 recordings were proactively removed from the Great 78 Project’s website, even though Plaintiffs  
 28 never contacted Defendants to request that these songs be taken down or otherwise identified these  
 recordings as potentially infringing before listing them in their proposed amended Exhibit A.  
 Stillman Decl. ¶ 4.

1 Finally, Plaintiffs tout their good faith in making this motion to amend. Mot. 6-7. But  
 2 Plaintiffs' amendment is in fact nothing more than a transparent effort to increase the maximum  
 3 statutory damages award they can seek based on the number of works in suit. *See* 17 U.S.C.  
 4 § 504(c). As explained above, adding those works will have the effect of adding a sizeable burden  
 5 to the already substantial task of litigating Plaintiffs' allegations of infringement for the works at  
 6 issue now. There is a "leveraging" quality to Plaintiffs' attempt to rack up a large number of works  
 7 in suit, because each new work (1) increases the potential statutory damages award, compounding  
 8 Defendants' potential exposure and increasing leverage to settle nonmeritorious claims, and (2)  
 9 simultaneously decreases Defendants' practical ability to defend or disprove liability as to any  
 10 individual work, because of the overwhelming volume alone. Courts typically disfavor that kind  
 11 of "in terrorem" use of litigation leverage, particularly in the absence of any meaningful economic  
 12 harm. *Cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (remarking on how the  
 13 compounding size of damages from many individual claims can entail a "risk of 'in terrorem'  
 14 settlements"); *Friends of the Earth v. Laidlaw Env't Servs.*, 528 U.S. 167, 209-10 (2000) (Scalia,  
 15 J., dissenting) (observing how the "availability of civil penalties vastly disproportionate to the  
 16 individual injury gives . . . plaintiffs massive bargaining power").

17 For all these reasons, too, the Court should exercise its broad discretion to deny Plaintiffs'  
 18 motion for leave to amend.

## 19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiffs' Motion for Leave to File a Second Amended  
 21 Complaint should be denied.



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Respectfully submitted,

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